SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-301

HARVEY FRANKLIN and MICHAEL DENT,

Petitioners,

v.

THE STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR THE STATE OF NEW JERSEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinion Below

The Opinion of the New Jersey Appellate Division, Docket No. A-1805-68, decided March 29, 1971, is unreported. The denial of certification by the New Jersey Su-

preme Court is reported at 58 N. J. 437, —— A. 2d —— (1971).

Counter-Statement of Facts

Petitioners were convicted of the armed robbery of Mr. and Mrs. Capozzelli at the Capozzelli's home in the early hours of the morning of August 8, 1966. The facts as set forth in the Opinion of the New Jersey Appellate Division show that the Capozzelli's had good opportunity to observe the defendants at close range for approximately twenty to thirty minutes. The Capozzelli's also identified the defendants from photographs of eight or ten persons shown to them at the police station less than fourteen hours after the robbery. On the following afternoon they also identified the defendants who were positioned behind a one-way mirror.

ARGUMENT

POINT I

Wade and Gilbert are not to be given retroactive effect.

The viewing of the defendants in the instant case took place in August 1966. Thus the rulings of both *United States* v. *Wade,* 388 U. S. 218 (1967), and *Gilbert* v. *California,* 388 U. S. 263 (1967), which require exclusion of identification evidence obtained in the absence of counsel cannot be applied. *Foster* v. *California,* 394 U. S. 440, 442 (1969), and *Stovall* v. *Denno,* 388 U. S. 293, 296 (1967). This is especially true since the New Jersey courts refuse to apply *Wade, supra,* retroactively. *State* v. *Mustacchio,* 57 N. J. 265, 270, 271 A. 2d 582 584 (1970).

POINT II

The identifications of the petitioners were fair in all respects.

The rulings of both *Wade* and *Gilbert* were based on the premise that an improperly conducted identification might inherently suggest a certain suspect as the perpetrator of the crime to an identifying witness; and that once this identification was made it would be unlikely that the witness would ever retract it. *United States* v. *Wade*, 388 U. S. 218, 228, 229 (1967).

This premise also extends to photographic identification—as a witness may retain the memory of the photograph rather than actual person. *Simmons* v. *United States*, 390 U. S. 377, 383 (1968). Thus the questions presented in the instant case are whether the photographic identifications and confrontations conducted were "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny due process of law. This would be a recognized ground of attack upon the conviction independent of any right to counsel claim. *Stovall* v. *Denno*, 388 U. S. 293, 302 (1967).

The burden to show this is on the petitioners as the identification procedures here took place before the present constitutional rule came into effect. Thus petitioners must prove that the "totality of the circumstances" surrounding the identifications were so impermissibly suggestive as to give rise to a "very substantial likelihood of irreparable misidentification." *See Stovall* v. *Denno*, *supra*, at 302; *Foster* v. *California*, 394 U. S. 440, 442 (1969); *Simmons* v. *United States*, 390 U. S. 377, 384 (1968); and *State* v. *Mustacchio*, 57 N. J. 265, 272, 271 A. 2d 582, 585 (1970).

It is significant to state that the initial photo identification of the defendants took place shortly after the crime by witnesses who had good opportunity to observe the defendants at close range during the crime. Such circumstances have been held as significant factors in determining the overall fairness of identification procedures. *Wade, supra,* at 241 (prior opportunity to observe, discrepancies between description and actual person, identification of a different person, photo identification prior to any lineup, failure to identify on a prior occasion, lapse of time); *Simmons* v. *United States, supra,* at 385 (lapse of time, opportunity to observe, good lighting, number of photographs shown); and *United States* v. *Shannon,* 424 F. 2d 476, 477 (3d Cir. 1970) (good lighting, opportunity to observe at close range, lapse of time, positiveness of identification).

It is clear that in the case *sub judice,* no irregularities were made in the identification procedures. They were ultimately fair under all the circumstances for there had been no lack of opportunity to observe nor was there any uncertainty in the identifications. *But cf. Foster* v. *California,* 394 U. S. 440 (1969).

Here, the witnesses were shown a selection of photographs from which they picked the defendants. These particular photographs were not emphasized in any way. Such procedures are used "widely and effectively in criminal law enforcement, from the standpoint of both of apprehending offenders and of sparing innocent suspects the ignomity of arrest by allowing eye witnesses to exonerate them through scrutiny of photographs." *Simmons* v. *United States, supra,* at 384.

Once the witnesses made identification from the photographs it was next up to the police to arrest the suspects and present them at either a lineup or "show-up" so that

the witnesses might make a positive identification. This is especially true where the suspects are taken almost immediately after the robbery as

> ". . . not only is the probable accuracy of the identification much more likely, but . . . an immediate confrontation is desirable as it may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is still fresh. This need of the police to know as soon as possible whether they have the right man justifies the identification procedure used here." (all citations omitted). *United States ex rel. Williams* v. *La Vallee,* 415 F. 2d 643, 645 (2d Cir. 1969), *cert. denied sub nom. Williams* v. *Follette,* 397 U. S. 997 (1970). *See also United States* v. *Shannon, supra,* at 477; and *Simmons* v. *United States, supra,* at 385.

Furthermore, although the only suspects the witnesses viewed at the "show-up" were the defendants—the memory of the incident was still "fresh in their minds", thus supporting the reliability of the identification. *State* v. *Thomas,* 107 N. J. Super. 128, 133, 257 A. 2d 377, 379 (App. Div. 1969).

POINT III

The trial court did not abuse its discretion in refusing to allow the demonstration.

Petitioners concede that the admission of demonstrative evidence is within the discretion of the trial court, but argue that the failure of the trial court to allow the defendants to exhibit the stocking masks was arbitrary.

Such an argument raises no federal question but is merely a matter of state law and therefore should not be considered by this Court. *See Gryger* v. *Burke,* 334 U. S. 728, 731, *reh. denied* 335 U. S. 837 (1948). This is especially true as the function of this Court in reviewing judgments from State courts is only "to correct them to the extent that they incorrectly adjudge federal rights." *Herb* v. *Pitcairn,* 324 U. S. 117, 126 (1945).

Here the New Jersey Appellate Division found that the trial court refused to allow the demonstration on the basis of a lack of probative value in impeaching the identification. This was on the basis that such demonstrations are meaningless where the defendant fails to take the stand and testify concerning the variable physical characteristics. It was held that no abuse of discretion was made in the trial court.

Petitioners now seek to elevate this argument to federal dimensions by citing *United States ex rel. Mitchell* v. *Pinto,* 438 F. 2d 814 (3d Cir. 1971), *cert. denied* —— U. S. ——, 29 L. Ed. 2d 124 (1971). The fact that they cite a federal case does not mean they have raised a federal question. Moreover, that case is not binding on the New Jersey courts. Even if it were binding it could be easily distinguished in that *Pinto, supra,* deals entirely with the subject of "self-incrimination", whereas the question raised in the instant case deals only with the discretion of the trial court and an alleged abuse thereof. Thus it would not apply under any circumstances.

The State further submits that even if an abuse of discretion was found to have been made by the trial court—such would at most amount to "harmless error" and should thus be disregarded by any reviewing court. See *Chapman* v. *California,* 386 U. S. 18, 22. *reh. denied* 386 U. S. 987 (1967).

CONCLUSION

For the foregoing reasons it is respectfully requested that the Petition for Certiorari and all relief requested by the petitioners be denied.

Respectfully submitted,

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